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IN THE

Supreme Court of the United States

October Term, 1965

No. 348

HAYWOOD WILLIAMS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Haywood Williams, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on April 26, 1966.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The conviction of the petitioner was affirmed by a judgment of the United States Court of Appeals for the Second Circuit entered on April 26, 1966, almost eleven months after its argument. Timely application for re-hearing was made and denied on May 16, 1966. On June 14, 1966, Mr. Justice Harlan extended the time to file a petition for certiorari until July 15, 1966.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

I. Were appellant's post-arrest confessions inadmissible against him as he had not been advised of his right to counsel?

II. Should the testimony of Agent Kreppein have been stricken for non-production of his notes of interviews between himself and the appellant?

D. Statutes Involved

United States Code, Title 21, Sections 173 and 174,

Title 18, Section 3500.

All of the foregoing are set forth in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

The appellant Haywood Williams was tried before Hon. Charles M. Metzner, one of the Judges of the United States District Court for the Southern District of New York, sitting without a jury.

The four count indictment charged various violations of the narcotics laws. The petitioner was convicted under the first two counts and acquitted under the second two counts. He was sentenced on December 1, 1964, to ten years as a second offender on each of the first two counts, said sentences to run concurrently.

F. Reasons for Granting Writ

I.

Perhaps the single most damaging evidence introduced against the petitioner in the course of his trial was the transcript of the interrogation of the petitioner conducted by an Assistant United States Attorney. The Court below characterized the contents of this interrogation as "damaging admissions." *United States* v. *Williams* (2nd Cir.), April 26, 1966, Slip Opinion, p. 3644. The reason for the interrogation at which the damaging admissions were obtained was solely to insert the final nails in the petitioner's coffin. In *United States* v. *Drummond*, 354 F. 2d 132 (2nd Cir. 1965) cert. den. June 20, 1966, there was some justification for a continued questioning as an active investigation into the scope of espionage activity was being conducted. Such an intent clearly distinguishes *Drummond*.

The trial of the petitioner commenced subsequent to June 22, 1964, the date of decision of *Escobedo* v. *Illinois*,

378 U.S. 478 (1964). The confessions and statements of the petitioner were challenged at the trial as having had been obtained in violation of the constitutional principles therein enunciated. The District Court's attention was specifically directed to the *Escobedo* case and particularly to Mr. Justice White's dissent. *Escobedo,* as we now know it, was certainly more appropriately described in its expanding boundaries by its dissenting opinion rather than its majority.

Applying *Escobedo* alone, the petitioner was an accused upon whom a criminal charge and investigation had been focused. He had been arrested, had been deposited and incarcerated in a Federal house of detention overnight and had been produced before an Assistant United States Attorney for questioning immediately prior to formal arraignment before a United States Commissioner. Though he advised the Assistant United States Attorney interrogating him that it was his intention to obtain counsel, questioning continued and damaging admissions were extracted.

The foundation for petitioner's complaint and the damaging admissions are contained below:

> "Q. Your name is Haywood Williams? A. Yes.
>
> Q. Mr. Williams, my name is Martin Gold, and I am an Assistant United States Attorney. Do you understand that? A. Yes.
>
> Q. Now, I am going to ask you some questions and I want you to know that you do not have to answer any question. Do you understand that? A. Yes.
>
> Q. You have been arrested for the violation of the Federal Narcotics Law. Do you understand? A. Yes.
>
> Q. You are entitled to have an attorney. Do you understand that? A. Yes.

Q. Do you have an attorney? A. I plan to have one.

Q. But you don't have one now? A. No, I don't.

* * * * *

Q. Do you sell heroin? A. No, I don't.

Q. On one occasion you sold it to a Federal Agent? A. Yes.

Q. When was that? A. Quite some time ago. In June, I think.

Q. In April of this year? A. Yes, probably was.

Q. How much? A. Several spoons. Don't know exactly what it was. It was quite some time ago.

Q. How much money did you get for it? A. I don't remember.

Q. Was it $215? A. I really can't remember what it was.

Q. Where did you give the agent the heroin? A. I think it was on Lenox Avenue, and 145th Street. I am not sure."

United States v. *Williams, supra,* Slip Opinion, pages 3643 and 3644.

It is respectfully submitted that the factual pattern of police interrogation conducted of the petitioner is sufficiently similar to that conducted of *Escobedo* to warrant application of the *Escobedo* rule in this case. The issue was raised in the Trial Court and squarely presented to the Trial Judge. The extent of these damaging admissions is best measured by that even with their prejudicial appearance in this case, the petitioner was able to obtain an acquittal in the Trial Court on two of the four counts of the indictment.

II.

It certainly would seem that if an arresting agent interviews a defendant and makes notes of that interview, and in those notes he refers to alleged damaging admissions made to him, those notes should be producible at the trial of the defendant pursuant to demand and under Section 3500 of Title 18 of the United States Code. This, of course, presupposes that the arresting agent has testified to these alleged admissions. The Court below takes the position that notes of such an interview would not necessarily be a statement within the meaning of that statute. Section 3500 (e) defines a statement in the context of the issues here of being:

> "A written statement made by said witness and signed or otherwise adopted or approved by him."

Certainly the interview notes of an agent dealing with alleged admissions by the defendant would be (1) a written statement, and (2) of such great importance to the defendant that any and all favorable constructions of the statute should be made to favor the defendant.

In this case the Court below was satisfied that the trial record supported the petitioner's claim that the interview notes of the arresting agent were not incorporated into more formal reports and were destroyed.

> "We next turn to appellant's claim that the district court erred in not granting the defense motion to strike all of Agent Kreppein's testimony on the ground that Kreppein failed to turn over to the defense certain informal notes he stated he had made of his conversation with Williams at the Narcotics Bureau on November 5, and which he did not incor-

> porate into the more formal reports that the Government did turn over to defense counsel pursuant to 18 U.S.C. §3500. Neither the trial court nor this court has had an opportunity to examine these notes; in such circumstances we cannot say that the notes were unrelated to the subject matter of Kreppein's testimony on his direct examination." *U.S.* v. *Williams, supra,* Slip Opinion, pp. 3646-7.

It had been established at the trial, that the appellant was interviewed by Kreppein at the office of the Bureau of Narcotics on November 5, 1963. Appellant, according to Kreppein, admitted in some pertinent detail, receiving money from Agent Coursey in April of 1963, and arranging to have delivered to him a quantity of narcotics. They also discussed the trip to Ossining, New York, which lent color and corroboration to Coursey's description of events. In effect, the appellant confessed.

With all the ease of extracting a fish hook sunk beyond the barb, appellant also established that Kreppein ". . . at the time of the conversations, . . . was taking informal notes" (24a).

> "Q. If you made any notes or any memorandum of your conversation with Williams on November 5, 1963, at 90 Church Street, it would appear here in Government's Exhibits 12 and 16 for identification? A. Formal memoranda or formal notes, yes, but at the time of the conversations, I was taking informal notes." (24a)

The notes were in the possession of the Government as Kreppein a Government agent had stored them with his other records in his home.

The appellant cannot prove intentional destruction, but must rest upon the still unanswered question in *Campbell* v. *United States,* 365 U.S. 85 (1961), and the application of Section 3500 (d) of Title 18, United States Code.

> "The parties argue whether destruction may be regarded as the equivalent of non-compliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of [the agent's] testimony."

Campbell v. *United States, supra,* at page 98.

> "Q. What did you do with those informal notes? A. I don't know.
>
> Q. Well, did you incorporate the contents of those informal notes in any one of these formal reports? A. Oh, yes, the information that it contained would have been placed in a memorandum, yes.
>
> Q. Now, you described in response to Mr. Dorsen's questions a conversation that you had with Williams at 90 Church Street. A. That is correct.
>
> Q. Concerning a trip to Ossining, concerning the sale of narcotics to Agent Coursey? A. That is correct.
>
> Q. And you made notes of that? A. Yes, I did." (24a-25a)

When compelled to examine his reports, and questioned persistently, Kreppein finally admitted that the notes had not been incorporated in any memorandum.

"Q. Any place in those reports? A. No—hold it, let me check the others.

Mr. Krieger: It is Exhibits 12 through 17.

The Witness: No, there was no mention in any of the memorandum." (26a)

After hearing a motion to strike his testimony for failure to produce the notes, Kreppein began to hedge a bit about what his notes contained. His candor may best be judged by the Court's acquittal of appellant on two counts in the indictment where the Government relied only on Kreppein's testimony.

Engaging in an harangue on Kreppein's credibility does not draw the issue into sharper focus. Credible or not, Kreppein testified to taking notes of an interview during which appellant allegedly confessed. The notes were not incorporated in other reports and were not produced. Is appellant entitled to relief?

Certainly, the substance of an alleged confession is as material as any evidence can be, so it cannot be argued that these notes deal with trivia or non-prejudicial matters.

The obvious benefits of the Jencks Act are thwarted if circumvention is permitted by convenient loss. It will be a long time before any defendant is able to prove willful destruction, and to impose such a burden upon a defendant effectively destroys the rights bestowed by this statute.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner
Haywood Williams

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 518—September Term, 1964.

(Argued June 7, 1965 Decided April 26, 1966.)

Docket No. 29486

UNITED STATES OF AMERICA,

Appellee,

—v.—

HAYWOOD WILLIAMS,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appellant, convicted of having violated 21 U. S. C. §§173 and 174 and of having conspired to do so, United States District Court for the Southern District of New York, Metzner, *J.*, without jury, appeals that conviction. Conviction affirmed.

DAVID M. DORSEN, Asst. United States Attorney; Robert M. Morgenthau, United States Attorney; Michael W. Mitchell, Asst. United States Attorney, *for appellee.*

ALBERT J. KRIEGER, New York City, *for appellant.*

Appendix A—Opinion of the United States Court of Appeals

WATERMAN, *Circuit Judge*:

Appellant Haywood Williams and his codefendant Mills Skinner were tried under an indictment charging violations of the federal narcotics laws, 21 U. S. C. §§173-74. The first count charged that from April 1, 1963 forward Williams and Skinner conspired to and did receive, conceal, sell, and facilitate the transportation, concealment, and sale of approximately 17.70 grams of illegally imported heroin. The overt acts set forth as furthering this alleged conspiracy, and a substantive offense they were charged with in the second count, related to a transaction which occurred on April 26, 1963, involving the sale of approximately 17.70 grams of heroin hydrochloride to one John Coursey, an agent of the Federal Bureau of Narcotics. Two further counts in the four count indictment, counts three and four, charged appellant with illegal possession and transportation of .32 grams of illegally imported cocaine on November 5, 1963.

On December 1, 1964 after a five day trial before a judge sitting without a jury Williams and his codefendant were found guilty as charged on counts one and two, and Williams, as a second offender, was sentenced to serve a term of 10 years. He was acquitted on counts three and four. Though both defendants timely filed notices of appeal, the appeal by Williams is the only one thus far brought forward, and only his rights are considered here.

Upon appeal Williams maintains that certain inculpatory statements he made to federal officers after his arrest and before he was brought before the U. S. Commissioner were erroneously admitted into evidence at his trial be-

cause he was denied the assistance of counsel and thus deprived of rights secured to him under the Sixth Amendment of the Constitution. He further claims that the entire testimony of Narcotics Agent Kreppein concerning the substance of the interviews he had with appellant should be struck pursuant to subsection (d) of the Jencks Act, 18 U. S. C. §3500(d), because Kreppein could not produce at trial the informal notes he took while eliciting the statements from appellant.[1]

I.

We turn first to appellant's contention that the admission at trial of certain postarrest, prearraignment statements made by him to various federal officers who failed to warn him of his right to counsel violated his Sixth Amendment rights as explicated by the Supreme Court in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). Recently the decisions of the Court in *Escobedo* and other cognate cases dealing with the Sixth Amendment right to counsel have been exhaustively interpreted and applied in several cases by our court sitting *in banc*.[2] E.g., *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (2 Cir. 1966); *United States* v. *Drummond*, 354 F. 2d 132 (2 Cir. 1965); *United States* v. *Cone*, 354 F. 2d 119 (2 Cir. 1965); *United*

[1] Appellant does not question the sufficiency of the evidence presented during the Government's case-in-chief. Putting aside the issues discussed in the body of this opinion and viewing the evidence as we must in the light most favorable to the Government, *United States* v. *Tutino*, 269 F. 2d 488 (2 Cir. 1959) it is clear that the conviction should be affirmed.

[2] Judge Feinberg was not then a member of our court and did not participate in the *in banc* deliberations.

States v. *Robinson*, 354 F. 2d 109 (2 Cir. 1965).[3] We of the present panel, irrespective of our individual positions expressed in our separate opinions in these *in banc* cases, believe that, for the time being, we should accept these recent pronouncements by a majority of our court on the "right to counsel" issue. Cf. *United States* v. *Kelly*, 349 F. 2d 720, 778 (2 Cir. 1965). We reserve to ourselves our several approaches to this issue,[4] and await further guidance from the Supreme Court.[5]

Appellant was arrested by Narcotics Agents Kreppein and Bailey at the corner of 129th Street and Seventh Avenue in Manhattan at 3 A.M. on November 5, 1963. The arrest was for the sale of the 17.70 grams of heroin made to Agent Coursey on April 26, 1963.

When arrested Williams was immediately informed by Agent Kreppein that he "was under arrest in violation of the federal narcotic laws and anything he said could be used against him in one straight blush."[6] The Government concedes that he was not advised that he was en-

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[3] On May 26, 1965 it was voted to consider these cases *in banc*. The within appeal was argued on June 7, 1965, with decision to be reserved until after the *in banc* cases had been finally disposed of.

[4] Judge Smith dissented in every one of these *in banc* cases. Judge Friendly dissented in *Stovall*, concurred in a separate written opinion in *Cone* and *Drummond*, and concurred without opinion in *Robinson*. Judge Waterman dissented in *Stovall*, *Drummond*, and *Robinson*, and in *Cone* concurred in the result only.

[5] The Supreme Court has granted certiorari in several cases raising *Escobedo* issues which, as in *Escobedo* itself, involve certain state court convictions: E.g., *Vignera* v. *New York*, 86 Sup. Ct. 320 (1965); *Miranda* v. *Arizona*, 86 Sup. Ct. 320 (1965); *Johnson* v. *New Jersey*, 86 Sup. Ct. 318 (1965).

[6] The lower court credited Kreppein's version of the facts and appellant makes no convincing argument that Kreppein's story should be discredited.

titled to the assistance of counsel before speaking further with the federal agents. A ten to fifteen minute conversation between the agents and appellant then ensued while the three sat together in the front seat of appellant's automobile. During the course of this conversation, Bailey, who was seated on the right or passenger side of the front seat, discovered several cocaine capsules on the floor of the automobile. Kreppein testified that appellant at that time admitted the cocaine was his.[7] Kreppein also testified that after the cocaine had been found appellant stated "that he wished to cooperate with us in initiating further cases involving narcotic violators . . . if we would forget about the arrest." When the agents informed appellant that they could not overlook the arrest appellant promptly withdrew his offer of cooperation. Appellant made no request for counsel during the course of his scene-of-arrest conversation. He was then driven to the Federal House of Detention on West Street in lower Manhattan where he was confined until about 9:30 A.M. on that same day.

At approximately 9:30 A.M. Kreppein took Williams from the House of Detention to the office of the Narcotics Bureau in Manhattan "for processing." Kreppein testified that a second conversation took place there and that appellant initiated this second conversation by asserting he had never sold narcotics. Kreppein then made it clear to appellant that appellant was not being arrested for possessing the cocaine he had admitted he owned but for an April 26 sale of heroin, and that the narcotics agents were

[7] When appellant was arrested he was seated on the front seat of his car with two women passengers, who might possibly have dropped the capsules at the time of arrest.

well acquainted with many of the circumstances surrounding that sale. Some fifteen to twenty minutes later, appellant, while continuing to deny that he had delivered any narcotics to the federal undercover agent, Coursey, to whom the narcotics had been sold that day, admitted that he had negotiated with Coursey and that he had accepted the money for the heroin prior to its delivery to Coursey by another. Appellant was not informed at any point during this conversation that he had a right to consult with counsel.

After appellant had been fingerprinted and photographed at the offices of the Narcotics Bureau Kreppein took him to the United States Courthouse in Foley Square where the U. S. Commissioner had his office. Upon arrival at the courthouse, however, appellant was first taken to the office of Martin R. Gold, an Assistant United States Attorney. Gold asked appellant 67 questions which, with the answers that were given by appellant, were taken down and transcribed by a stenographer and were introduced into evidence by the Government at appellant's trial, as Government's Exhibit 22A.[8]

In addition to appellant, his interrogator, and the stenographer, Agent Kreppein and a second narcotics agent were present. Gold's interrogation began as follows:

Q. Your name is Haywood Williams? A. Yes.

---

[8] No issue was raised below and no claim was advanced to us that this interrogation was conducted during a detention of unreasonable length prior to arraignment. Therefore we have not dealt with the problem, despite *U. S.* v. *Middleton*, 344 F. 2d 78 (2 Cir. 1965) decided subsequent to the *Williams* trial but prior to the filing of the appeal briefs.

Q. Mr. Williams, my name is Martin Gold, and I am an Assistant United States Attorney. Do you understand that? A. Yes.

Q. Now, I am going to ask you some questions and I want you to know that you do not have to answer any question. Do you understand that? A. Yes.

Q. You have been arrested for the violation of the Federal Narcotics Law. Do you understand? A. Yes.

Q. You are entitled to have an attorney. Do you understand that? A. Yes.

Q. Do you have an attorney? A. I plan to have one.

Q. But you don't have one now? A. No, I don't.

After these introductory questions and answers the interrogation continued apace and among the questions and answers was the following sequence:

Q. Do you sell heroin? A. No, I don't.

Q. On one occasion you sold it to a Federal Agent? A. Yes.

Q. When was that? A. Quite some time ago. In June, I think.

Q. In April of this year? A. Yes, probably was.

Q. How much? A. Several spoons. Don't know exactly what it was. It was quite some time ago.

Q. How much money did you get for it? A. I don't remember.

Q. Was it $215? A. I really can't remember what it was.

> Q. Where did you give the agent the heroin? A. I think it was on Lenox Avenue, and 145th Street. I am not sure.

In all of the 67 questions there was but one, the 63rd, that bore any relationship to a continuing investigation of narcotics suppliers or purveyors. That question was "Where did you get the heroin from?" It was answered evasively.

After this interrogation appellant was taken, just before noon, before the U. S. Commissioner, pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure, and the officer's complaint charging appellant with the April 26 sale to Agent Coursey was forthwith filed.

I.

We first consider whether appellant's inculpatory statements made between 3 A.M. and noon of November 5, 1963, first at the scene of arrest, then at the Narcotics Bureau later that morning, and finally at Assistant United States Attorney Gold's office, were properly admitted into evidence against appellant at appellant's trial over appellant's objections. We, considering ourselves bound by the above mentioned previous holdings of our court, hold here that all were properly admissible.

The contention that the trial court should have excluded appellant's damaging inculpatory scene-of-arrest admission that the cocaine discovered in his automobile belonged to him is easily disposed of. Appellant was not tried to a jury and the trial judge acquitted appellant of the charge of

illegally possessing this cocaine, despite appellant's admission of ownership. This evidence therefore, under the circumstances, could not have been prejudicially relevant to the judge's determination of guilt on the other two counts.

The contention that the trial judge should have ruled that Government Exhibit 22A, a true copy of the transcript of appellant's conversation with Assistant United States Attorney Gold, was inadmissible is foreclosed to us by *United States* v. *Drummond, supra.* True, appellant made damaging admissions during the course of this conversation. But, before any of these admissions were elicited, Gold acquainted appellant with his right to remain silent and told him that he was entitled to have an attorney. Appellant indicated that he understood he had a right to have an attorney and that he planned to have one later. He made no request for counsel at the time. Under similar circumstances, a majority of our court has held that the Government was not required under the Sixth Amendment to refrain from continuing a non-coercive interrogation until the one interrogated obtained his lawyer or a lawyer was produced by the Government. Our court's majority opinion in *Drummond* holds admissible the inculpatory admissions of an accused if he has received an initial notification of his rights, including the right to counsel, and thereafter does not request counsel but instead, without counsel, proceeds to answer questions put by government interrogators. *United States* v. *Drummond, supra,* at 147. Compare *United States* v. *Drummond,* 158-59 (Waterman, *J.*, dissenting).

We make no attempt in the present case to distinguish the fact-pattern here from the fact-pattern in *Drummond,*

for we do not understand *Drummond* so as to permit us on this issue to reach a different result here from the result the majority reached there. We do point out, however, that whatever purposes may be assigned to justify the continuing interrogations of Drummond, the conversation with Williams at the Narcotics Bureau office and the interrogation of him by the Assistant United States Attorney were quite obviously not designed to elicit further information as may be thought necessary to pursue an investigation, to apprehend others, or to prevent other crimes.[9] The purpose was to elicit information from one in custody that would corroborate the proof the Government already possessed that if the arrested one were the actor on April 26 he was undoubtedly guilty of a particular single criminal act concerning which the Government had full information.

We now reach the contention that the trial judge should have excluded the inculpatory statements that appellant made after his arrest at the scene of his arrest and later made that same day at the Narcotics Bureau offices. Based upon the opinion for a majority of our court in *United States* v. *Cone, supra,* these statements would seem to be admissible against appellant at trial *a fortiori.* These conversations with Kreppein appear to have been so conducted by the agent that one receives the impression that appellant's inculpatory statements were "given voluntarily under circumstances which did not create any feeling that [appellant] was compelled to answer . . ." *United States* v. *Cone, supra* at 122. Nor is there any indication in this case that

[9] See *United States* v. *Cone,* 354 F. 2d 119, 126, quoted and relied upon in *United States* v. *Drummond,* at 147.

appellant was improperly induced to speak by promises of leniency.

Appellant's inculpatory statements made to Kreppein would be inadmissible against appellant if the Court in *Escobedo* v. *Illinois, supra,* is telling us that an arrested one must be told upon arrest that before he admits anything to the police he has a right to consult with counsel, and is telling us that no inculpatory statement elicited by the police made prior to such consultation is admissible unless the arrested one having been adequately informed of his right to consult with counsel clearly waives this right. In *United States* v. *Cone, supra* at 123, Chief Judge Lumbard, speaking for himself and four other members of our court, explicitly refused so to interpret *Escobedo.* See also *United States* v. *Drummond, supra* at 145-146. As long as *Cone, Robinson,* and *Drummond* remain the law in the Second Circuit, the post-arrest prearraignment inculpatory admissions of an accused will be admissible against him at his trial if they were given under such circumstances that a judge can satisfy himself that the accused when the statements were made felt he was not compelled to speak.

II.

We next turn to appellant's claim that the district court erred in not granting the defense motion to strike all of Agent Kreppein's testimony on the ground that Kreppein failed to turn over to the defense certain informal notes he stated he had made of his conversation with Williams at the Narcotics Bureau on November 5, and which he did not incorporate into the more formal reports that the

Government did turn over to defense counsel pursuant to 18 U. S. C. §3500. Neither the trial court nor this court has had an opportunity to examine these notes; in such circumstances we cannot say that the notes were unrelated to the subject matter of Kreppein's testimony on his direct examination. Compare *United States* v. *Sten*, 342 F. 2d 491, *cert. denied*, 382 U. S. 854, 86 S. Ct. 103 (1965). Nevertheless, we hold that the Government's failure to produce the notes does not require the sanction appellant sought or the reversal of appellant's conviction. It is by no means clear that any of the notes was a "statement" within the meaning of the statute, see *United States* v. *Comulada*, 340 F. 2d 449, *cert. denied*, 380 U. S. 978 (1965); *United States* v. *Jones* (2 Cir. March 17, 1966), and, despite vigorous cross-examination of the agent, appellant has not persuaded us that they were wilfully destroyed or other than innocently misplaced. Under these circumstances, we hold that the court properly refused to strike Kreppein's testimony since we find the notes were not "lost" in bad faith. See *United States* v. *Campbell*, 303 F. 2d 747, 751 (1 Cir. 1962), *rev'd on other grounds*, 373 U. S. 487 (1963). The language of the Jencks Act bolsters this position. Section 3500(a) speaks of statements "in the possession of the United States," and subsection (d) provides that its sanctions apply "if the United States elects not to comply." See *United States* v. *Greco*, 298 F. 2d 247, 251 (2 Cir.), *cert. denied*, 369 U. S. 820 (1962).

The judgment of conviction is affirmed.

APPENDIX B

Statutes Involved

United States Code, Title 21

SECTION 173. IMPORTATION OF NARCOTIC DRUGS PROHIBITED; EXCEPTIONS; CRUDE OPIUM FOR MANUFACTURE OF HEROIN; FORFEITURES.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of

Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, Sec. 2(b), (d), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, Sec. 3, 46 Stat. 586.

United States Code, Title 21

SECTION 174. SAME; PENALTY; EVIDENCE.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than $20,000. For a second or subsequent offense

(as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, Sec. 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, Secs. 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, Sec. 105, 70 Stat. 570.

United States Code, Title 18.

§3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness

of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub. L. 85—269, Sept. 2, 1957, 71 Stat. 595.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 348

HAYWOOD WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. II, 38a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1966. (R. II, 49a). A petition for rehearing was denied on May 16, 1966 (R. II, 58a). On June 14, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including July 15, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

228-056—66

QUESTIONS PRESENTED

1. Whether petitioner's conviction must be reversed because of the introduction into evidence, at a trial commencing on November 24, 1964, of a post-arrest statement made by petitioner after he had been advised of his right to counsel and of his right not to answer questions.

2. Whether the trial court erred in failing to strike the testimony of a government agent who testified that he had searched for, but had been unable to locate, informal handwritten memoranda of a conversation with petitioner.

STATEMENT

After waiver of trial by jury (R. I, 2a), petitioner and another were convicted in the United States District Court for the Southern District of New York on two counts of an indictment charging the sale, and a conspiracy to sell, a quantity of heroin on April 26, 1963, in violation of 21 U.S.C. 173, 174.[1] (R. I, 2a). Petitioner was sentenced, as a second offender, to imprisonment for ten years on each count, the terms to run concurrently (R. I, 33a–34a). The court of appeals affirmed.

1. Federal Narcotic Agent John Coursey testified that, while working in an undercover capacity on April 26, 1963, he was introduced to petitioner in New York City by an informant. He arranged to buy heroin from petitioner, who accepted money but

[1] Petitioner was acquitted by the court on two counts charging narcotic offenses on November 5, 1963 (the date of his arrest) with respect to a quantity of cocaine (see R. I, 2a, 6a–7a).

who sought to satisfy himself that Coursey was not an "F.B.I. man". After some delay, during which Coursey was transported to Ossining, N.Y., and back, the heroin was delivered to Coursey that evening by petitioner's co-defendant (R. I, 8a–15a).

A former narcotic agent, John Kreppein, who had kept petitioner under surveillance on the day of the sale, testified that he arrested petitioner at 3 a.m. on November 5, 1963, in a Cadillac car in which he was riding with two females and in which, during an ensuing search, cocaine was found (R. II, 1a–13a). Petitioner was immediately advised that he was under arrest for violation of the federal narcotic laws and that anything he said could be used against him. Petitioner asked to see the officer's badge, admitted the cocaine was his, and offered to supply information about sources of narcotic supply in return for release, mentioning individuals named "Jay-Jay" and "Lefty" (R. II, 12a–16a; R. I, 16a–21a). The officer rejected petitioner's offer and brought him to a federal detention house for the remainder of the early morning hours. At 9:30 a.m., petitioner was taken by Kreppein to the Narcotics Bureau for processing. Agent Kreppein believed from petitioner's statements that he thought he was in custody for possession of cocaine. Consequently, the officer referred to petitioner's April trip to Ossining, N.Y. Petitioner admitting making the trip, negotiating with and accepting money from Agent Coursey, but stated that he had not delivered the heroin to the agent (R. II, 17a–20a). After processing, petitioner was taken at

approximately 11 a.m. to the federal court house. There he was first brought to the office of an Assistant United States Attorney where he was questioned in the presence of a stenographer, Kreppein and another agent. He was arraigned approximately 45 minutes later (R. II, 20a–21a).

The transcript of the interrogation by the Assistant United States Attorney reads, in part, as follows (Pet. 6a–7a):

> Q. [Mr. Gold] Your name is Haywood Williams?—A. Yes.
>
> Q. Mr. Williams, my name is Martin Gold, and I am an Assistant United States Attorney. Do you understand that?—A. Yes.
>
> Q. Now, I am going to ask you some questions and I want you to know that you do not have to answer any question. Do you understand that?—A. Yes.
>
> Q. You have been arrested for the violation of the Federal Narcotics Law. Do you understand?—A. Yes.
>
> Q. You are entitled to have an attorney. Do you understand that?—A. Yes.
>
> Q. Do you have an attorney?—A. I plan to have one.
>
> Q. But you don't have one now?—A. No, I don't.
>
> * * * * *
>
> Q. Do you sell heroin?—A. No, I don't.
>
> Q. On one occasion you sold it to a Federal Agent?—A. Yes.
>
> Q. When was that?—A. Quite some time ago. In June, I think.

Q. In April of this year?—A. Yes, probably was.

Q. How much?—A. Several spoons. Don't know exactly what it was. It was quite some time ago.

Q. How much did you get for it?—A. I don't remember.

Q. Was it $215?—A. I really can't remember what it was.

Q. Where did you give the agent the heroin?—A. I think it was on Lenox Avenue, and 145th Street. I am not sure.

2. On cross-examination Kreppein testified that he had made informal notes at the time of his conversations with petitioner and that formal memoranda which were produced at trial were based upon such notes (R. I, 24a). At first he indicated that he had made such informal notes of petitioner's admissions at the Narcotics Bureau about a trip to Ossining and a sale to Agent Coursey (R. I, 25a), but he thereafter explained that the informal notes which he had made related principally to information supplied by petitioner with respect to "Jay-Jay" and "Lefty", and that he himself mentioned the trip to Ossining to refresh petitioner's memory about the crime for which he was being arrested (R. II, 21a-23a). The witness testified he had not been able to find the handwritten notes in question. He explained that ordinarily such notes were kept in his notebook during active investigation, then removed to files or subsequently to cartons labeled by year. On leaving the Narcotics Bureau, he had taken the cartons home and

placed them in his attic. He had searched there and elsewhere for the notes but had not been able to locate them (R. I, 26a-27a). The court denied a defense motion pursuant to 18 U.S.C. 3500 to strike the testimony of the witness (R. I, 29a).

ARGUMENT

1. The court below properly rejected petitioner's claim that his inculpatory statements made to arresting agent Kreppein[2] and to an Assistant United States Attorney prior to arraignment were inadmissible at trial as having been made in violation of petitioner's right to assistance of counsel. Petitioner's principal contention here is that the rule of *Escobedo* v. *Illinois*, 378 U.S. 478, rendered inadmissible the evidence of his interrogation by an Assistant United States Attorney. That contention is answered by this Court's explanation in *Johnson* v. *New Jersey*, No. 762, O. T. 1965 (decided June 20, 1966), slip opinion, pp. 13–14 (emphasis supplied), that "the precise holding of *Escobedo* was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,

> '[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations

[2] The court below noted that the first scene-of-arrest admission related only to possession of cocaine for which petitioner was acquitted by the court, and that the second made at the Narcotics Bureau was given voluntarily under non-compulsory circumstances.

> that lends itself to eliciting incriminating statements, *the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent* . . .' 378 U.S. at 490–491.

The additional guidelines laid down by this Court in *Miranda* v. *Arizona,* 384 U.S. 436, do not apply to petitioner's trial, which commenced on November 24, 1964. See *Johnson* v. *New Jersey, supra.*

2. There is no merit to petitioner's claim that the trial court erroneously refused to strike the testimony of former narcotic agent Kreppein because of the government's failure to produce his handwritten notes. In view of Kreppein's testimony that he had been unable to find the notes despite a diligent search, there was no showing that any statement "in the possession of the United States" existed so as to bring into play the sanction of subsection (d) of section 3500. This is plainly not a case involving the wilful destruction of the notes. Cf. *Killian* v. *United States,* 368 U.S. 231, 241–242. Nor could the impeachment of Kreppein's testimony have been of great significance since the court, apparently disregarding his testimony, acquitted petitioner on the two counts of the indictment relating to the offense as to which he was the sole witness.